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PROTECTION OF JOURNALISTS IN ARMED CONFLICT: *AN INSIGHT FROM THE PERSPECTIVE OF INTERNATIONAL HUMANITARIAN LAW*

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ABSTRACT

War journalism, by the nature of its work, is arguably one of the most dangerous professions in the world. Journalists working in conflict-prone areas are constantly exposed to the inherent threats of the battlefield. Over the period of time, there has been a number of attacks, assaults, and arrests upon journalistic profession who conduct reporting from conflict situations worldwide. What is more serious is that most of these attacks are deliberate in nature. The conflicting parties often fear the undeniable powers of word and image journalists spread. Under the current international regime, there is a number of normative frameworks which guarantees the protection of journalist operating in armed conflicts. However, there is a serious question regarding the adequacy and implementation of the available protection mechanisms.

This paper is an attempt to study the current international framework which governs and protects the journalists operating in International and Non-International Armed Conflicts worldwide. Particular focus is given to the protection available under International Humanitarian Law. In addition, the paper clarifies the conditions in which journalists lose their protection and become legitimate targets. The paper also traces out the shortcomings within the current regime of International Humanitarian Law. Finally, the paper discusses some additional proposals that could enhance the safety of journalists in the field. The paper follows the qualitative method of research and uses both primary and secondary sources of information.

KEYWORDS

Armed Conflict, International Humanitarian Law, Journalists, Geneva Conventions.



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I. Introduction

In the areas of armed conflict, there is hardly any civil society or non-governmental organizations, which critically monitor the conduct of government or belligerent force. Also, civilians are busy protecting themselves and surviving rather than taking notes of the abuses happening around. Thus, it is the journalists who are assumed to have special importance in armed conflicts as they are among the few ones who expose the stories of the war¹ to the outer world. Journalists play a vital role of bridging the gap between the outside world and the conflict area by disseminating the information relating to the stories of the conflict. The international community mainly gains information related to the breaches of international law through the information transmitted by the journalist (Detter, 2000). Also, for general people, media is the primary source of information regarding the conflict situation. To support this, one of the humanitarian law jurists writes:

“.....journalists are extremely useful as part of the machinery which ensures the implementation of the rules of war when most other means of enforcement are lacking ... It is often through the reports of journalists that inhuman practices in wars are made known to the rest of the world and their function of transmitting news to those outside a particular conflict may be conducive to the condemnation by world opinion of certain methods of warfare or a certain state of affairs.”(Detter, 2000)

A ‘journalist’ can be defined as ‘any correspondent, reporter, photographer, and their technical film, radio, and television assistants that are ordinarily engaged in any of these activities as their principal occupation’ (UN General Assembly Resolution 2854 (XXVI)). Regardless of their important role and responsibility in the society, the number of journalists who are arrested, threatened, mistreated, or killed is on a constant rise (Saul, 2008). During the armed conflict, a journalist is in constant danger not only because of collateral damages happening around but also targeted attacks to them, as well as the constant danger of being arrested, kidnapped, or accused of espionage (Düsterhöft, 2013). The Committee to Protect Journalist (CPJ) reported that 587 journalists were killed in armed conflict between 1992 and 2021 (Committee on Protection of Journalist, 2021). Most of the deaths occurred in war prone countries like Syria, Afghanistan, Somalia, and Iraq. These casualties could be the result of various causes like, poor preparation and training by media organizations, reckless risk-taking, deliberate execution of journalist, and sheer bad luck.

International Humanitarian Law (IHL) is the main international legal regime that governs the protection of journalists in armed conflicts. In fact, it is also the one that governs armed conflicts (both national and international) in general. While there are sufficient provisions in the Geneva Conventions (GCs) and its Additional Protocols (APs) for the protection of journalists operating in armed conflict, the increasing attacks on the journalist often raise discussion regarding their adequacy and enforcement mechanism. In fact, there is wide discussion among international scholars and practitioners that certain special provisions are to be afforded to journalists to deter attack and afford more protection.(Robertson and Nicol, 2008)

¹The terms ‘Armed Conflict’ and ‘War’ are used interchangeably

II. Distinction of Journalist

It is necessary to distinguish the types of journalist, who operate in armed conflicts. The distinction is important because, under IHL, the status of person determines the standards of treatment and protection to which they are entitled. The types of occupational journalism, as recognized by IHL, are:

- Independent Journalists,
- War Correspondents,
- 'Embedded' Journalists

Independent Journalists are the ones who work independently as freelancer, stringers, or part of a media organization, and aren't authorized to accompany the armed forces. The status of these type of journalists is that of a civilian, so they aren't entitled to the status of Prisoners of War (POW) upon capture by the armed forces. More explanation will be done in latter part of this paper.

War correspondents, on the other hand, are the special type of journalist who is accredited to the armed forces. This type of journalist obtains Prisoner of War (POW) status upon capture by belligerent force. The *Dictionnaire de droit international public* defines war correspondents as '*specialized journalist[s] who [are] present, with the authorization and under the protection of the armed forces of a belligerent, on the theatre of operations and whose mission is to provide information on events relating to ongoing hostilities*' (Salmon, 2001). Furthermore, International Criminal Tribunal for the former Yugoslavia (ICTY) defined 'war correspondent' as '*individuals who, for any period of time, report (or investigate for the purposes of reporting) from a conflict zone on issues relating to the conflict*' (*Prosecutor v Talic*). Therefore, these types of journalists are officially authorized by the government and accredited by the military. However, it doesn't imply that the war correspondents are *combatants* under IHL just because they are treated as POW upon their capture. They remain civilians but are accorded POW status in recognition of their close proximity with the armed forces to which they are attached.

Apart from these two, there is another category of journalist known as 'embedded' journalists. The term was already used in World War I but it gained popularity since the beginning of the Iraq War in 2003 (Keeble, 2004). The position of these type of Journalist is quite controversial in nature because of professional ethics of such practice. (Saul, 2008) These journalist also obtain POW status upon capture as persons accompanying the military. Embedded journalists live, eat, and move in combat with the units they are attached to. (Düsterhöft, 2013) In general, the protection available to these journalists are same to that of war correspondents.

III. Protection of Journalists in International Armed Conflicts

International Humanitarian Law (IHL) applies the principle of distinction, and hence civilians and combatants are protected differently (1997 Protocol I, Art 43(2), Art 50). Civilians and civilian objects must not be the object of attack, only combatants and military objectives are the legitimate target of attack (Saul, 2008). In addition, protection of journalists are the part of *jus in bello* (also known as IHL), which consists of a set of rules designated to regulate the conduct of armed conflicts.

It has to be noted that along with IHL, human rights law is also applicable in the situation of armed conflicts, although most provisions can be derogated from during war and have inherent limitation (Düsterhöft, 2013). If there is conflict and/or disharmonious provisions of human rights law and IHL, then IHL is to be applied as *lex specialis* in times of armed conflict. (*ICJ Case, Legality of Threat or Use of Nuclear Weapons*).

a) Protection available in relation to Attacks

Article 79 of Additional Protocol I to Geneva Conventions (GCs) is the main and the most important Article of International Humanitarian Law that explicitly refers to the protection of journalists in International Armed Conflicts. The Article was adopted by consensus and hence no any reservations have been made. The Article mentions that journalists engaged in dangerous professional missions in areas of armed conflict, whether independent journalists or war correspondents, shall be considered as civilians within the meaning of Article 50, paragraph 1 (1977 Protocol I, Art 79). Thus, journalist, regardless of their type, is entitled to same protection as that of civilians. This means that whole set of Geneva Convention IV and Article 51&57 of Additional Protocol I is applicable for the protection of Journalists. Thus, attack on journalists is strictly prohibited under IHL. In addition, indiscriminate attacks are prohibited, and a variety of precautionary measures must be taken in military operations to spare civilians and civilian objects (1977 Protocol I, Art 51(3) (4), 57, 58). Journalists cannot be used as hostages or human shields, nor may they be made the object of reprisals (1977 Protocol I, Art 51(7)). These provisions apply unless and as long as journalists do not take any action that adversely affects their status as civilians, as outlined in Article 79(2) of Additional Protocol I. This implies that, as soon as civilians (including journalists) take 'direct participation in hostilities' they lose their protection against attack (1977 Protocol I, Art 51(3)). Taking part in hostilities make such civilians (including journalists) legitimate military objectives for the duration of their participation in hostilities (Saul, 2008). It has to be noted that taking direct participation in hostilities doesn't entitle civilians (including journalists) the privileges and immunities of combatants, including POW status.

In case the journalists (including war correspondents) are situated near or among armed forces or other military objectives which are legitimate military targets liable to attack, their incidental or collateral killing in the course of such attacks will not be unlawful (Saul, 2008). However, the attacking forces should comply with the principles of humanitarian law (ensuring civilian casualties is not greater than military advantage anticipated). (*This also refers to IHL principle of necessity and proportionality*)

Article 85(3)(e) of Additional Protocol I mentions that attack on civilians is to be considered as war crimes. This provision further manifests the illegality and criminalization of attack upon journalists.

b) Protection available in relation to Arrest

Being arrested is another threat journalists' face when reporting from armed conflicts. In case of arrest, human rights law complement and reinforce International Humanitarian Law (Düsterhöft, 2013). All types of journalists must be treated as civilians if they get are arrested. It is important to note that, if arrested, their exact status and the protection available depend on their place of arrest and nationality.

If journalists are arrested by the authorities of their own country, then internal laws along with universal human rights law is applicable. If a journalist of a non-belligerent state is arrested, then the journalist is protected by potential diplomatic relation between the two States and are protected by peacetime law, including human rights (Mukherjee, 1995). Journalist arrested by authorities of another belligerent nationality enjoy protection afforded by Article 75 of Additional Protocol I.

c) Protection available in relation to Detention

Independent journalists and war correspondents (including embedded journalists) are afforded different protection in case of detention. Independent journalists remain civilians and are 'solely'

afforded the protection of Article 75 of Additional Protocol I, Geneva Convention IV, and Common Article 3 of Geneva Conventions. On the other hand, war correspondents are specifically mentioned in Article 4 of Geneva Convention III, and are so protected by Prisoners of War (POW) status as persons accompanying the military. Therefore, if fallen into the hand of adversary, war correspondents benefit from all protections available to POW.

However, Article 4 of GC III doesn't relate to nationals of a Party to the conflict, nor to the nationals of co-belligerent, or neutral States maintaining diplomatic relations with the belligerent State.

IV. Protection of Journalists in Non-International Armed Conflicts

Under the current regime of International Humanitarian Law, the protection of combatants and civilians is more comprehensive and stronger in relation to International Armed Conflicts (IACs). Within IHL, the only humanitarian law provision governing Non-International Armed Conflicts (NIACs) is Common Article 3 of Geneva Conventions and Additional Protocol II (Article 1(1) of Additional Protocol II). This seems to be inappropriate because of the increasing nature of non-international conflicts (Harbom and Wallenstein, 2004). Due to the less development of overall legal regime in NIACs, the legal protection offered to journalists is stronger and more expansive in IACs. Thus, this has also led to the question of whether special protection of journalists in NIACs is necessary.

Most notably, in NIACs, there is no status of Prisoners of War (POW) available and, further, no distinction has been made between journalists and war correspondents.

- **Protection available in Non-International Armed Conflicts**

Additional Protocol II doesn't include any specific provision related to the protection of journalist's in non-international conflicts, such as that found in Art 79 of Protocol I in respect of international conflicts. In NIACs, journalists are protected by minimum guarantees of Common Article 3 of GCs along with Article 13 of Additional Protocol II. In particular, Article 13 of AP II provides that:

'The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited'

Also, Rule 34 of ICRC Customary International Humanitarian Law mentions that state practice has enabled the protection of and respect for journalists engaged in professional missions in armed conflicts as a norm of customary international law. This is applicable to both NIACs and IACs. Furthermore, Common Article 3 specifically prohibits violence and torture, hostage taking, 'outrages upon personal dignity, in particular humiliating and degrading treatment', and unfair trials.

Violation of Common Article 3 are not expressly listed as grave breach of IHL, or mentioned as subject to criminal liability. However, International Criminal Tribunal for Former Yugoslavia (ICTY) in the case *Prosecutor v. Tadic, 1995* recognized that the violations of Common Article 3 attracts individual criminal liability as the violations of the laws and customs of war (*Prosecutor v. Tadic, 1995, ICTY*). Due to its recognition as war crimes, there remains possibility of international prosecution of certain crimes committed in NIACs.

V. Problems within International Humanitarian Law for effective Protection of Journalists

Current International Humanitarian Law has guaranteed certain provisions for the protection of journalists operating in International and Non-International Armed Conflicts. While the protection available in IACs are comprehensive and stronger, the one for NIACs is not well developed. Along with this, there are certain ambiguities in current IHL that has made protection of journalists less effective. Some important issues with present IHL that requires clarification can be mentioned as:

a) Lack of definition of the term 'journalist'

The exact and precise definition of 'journalist' hasn't been made in any Geneva Conventions or its Additional Protocols. This has created impaired and blurred distinction between general media-active civilians and journalists. (Verschingel, 2008/9) In other words, it is difficult to determine who is an active citizen and who is a journalist because of increase of civilian journalists, multimedia active citizens, and hobby bloggers.

This issue, however, wouldn't matter to the protection offered by IHL because apart from war correspondents, all other journalists are equally protected as civilians. Nevertheless, IHL is required to provide appropriate definition of a journalist.

b) Ambiguity in the term 'direct participation'

Article 51(3) of Additional Protocol I provide that:

'Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities'

Along with this, Article 79(2) of AP I mention:

'They shall be protected as such under the Conventions and this Protocol, provided that they take no action adversely affecting their status as civilians...'

In these provisions, IHL is silent and unclear on what constitutes an action that could be interpreted as 'adverse' or characterized as 'direct participation' in hostilities, which eventually results in termination of protection as civilians. That is to say, what it means to take a direct part in hostilities isn't well settled.

ICRC Commentary to Article 51 of AP I defines 'direct participation' as '*acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces*' (ICRC Commentary on Additional Protocol I, para 1944). Moreover, Supreme Court of Israel, in the landmark *Targeted Killings* case, concluded that the conduct amounting to, for instance, transporting combatants or weapons, servicing weapons and volunteering as human shields can amount to direct participation. (*Public Committee against Torture in Israel v Government of Israel*)

IHL hasn't defined if the professional activities of journalists, like, propaganda contained in news stories be considered as 'adverse action'? Is transmitting military messages by radio for the benefit of a party a direct participation in hostilities? Does using force in self-defense amount to direct participation?

Therefore, it is necessary to clarify these ambiguities within law so as to determine the circumstances where journalists can be make legitimate targets of military attacks. This would help to decrease the

incidental attacks on journalists, which mainly results from misunderstandings or incapability in distinguishing between media and war efforts.

c) Different Protection Afforded in IACs and NIACs

As already discussed, the legal regime for the protection of journalists in NIACs isn't well developed. Additional Protocol II not being ratified by number of State leaves Common Article 3 of GCs the sole International Humanitarian Law provision that is directly applicable in Non-International Armed Conflicts. Within the ambit of Common Article 3, journalists cannot be distinguished as independent journalist or war correspondents. They are merely protected under the heading of 'civilians'. In addition, war correspondents do not receive the status of POW if they get arrested and detained in NIACs.

Addressing this issue could require the creation of a new special regime of protection in NIACs. This seems to be lengthy and complex as it requires the international community to discuss and reach into a consensus. More practical and prompt solution for this could be raising awareness among militaries and governments worldwide to afford same set of protection to journalists as available in IACs.

d) Distinction Between Independent Journalists and War Correspondents

Although all types of journalist are protected as 'civilians' in NIACs, they receive different protection in IACs. The distinction between the protection available to war correspondents (including embedded journalists) and independent journalists in IACs because of former's close proximity to the conflicts seems to be outdated. This is because increasing number of civilian journalists and growth of social media and technological innovations. At present, independent journalists are also exposed to similar risks as that of war correspondents (Committee on Protection of Journalist, 2021). Thus, it is deemed necessary for special protection of independent journalists similar to that of war correspondents.

e) Lack of Implementation of existing IHL

Despite some ambiguities, journalists in both IACs and NIACs are guaranteed protection by 'the black-letters of law'. However, scholars often argue that journalists still face attacks because most of them are never investigated, prosecuted, or punished (Saul, 2008). Ben Saul, Professor of International Humanitarian Law says that, '*humanitarian law may be formally 'adequate' to protect journalists, but only one in eight of those accused of killing journalists worldwide are prosecuted, while in two-thirds of cases, the killers are not even identified*' (Saul, 2008). Lack of investigations and overarching impunity is drastic in IHL (Düsterhöft, 2013). Therefore, disregard and disrespect to existing IHL provisions has also caused difficulties in effective protection of journalists.

VI. Enhancement of Protection of Journalist in Armed Conflicts

In light of above analysis, a question arises if some form of steps need to be taken in order to enhance the protection of journalists. Also, number of NGOs, legal scholars, practitioners, and journalists have proposed range of ideas and reforms to improve current situation of journalists. These proposals can be categorized as:

a) Ratification of Additional Protocols

Although Geneva Conventions are ratified by most of the countries, same is not the case for its Additional Protocols. Ratification of APs provides better protection in International and Non-International Armed Conflicts. Also, APs are not binding on States who have not ratified them.

Ratification further shows State's commitment in respecting and adhering to the laws of the war. Furthermore, this can be beneficial in raising awareness and education campaign to clarify the nature of journalist's protection.

b) Adoption of Special Protection for Journalists

Constant voice has been raised for creating special protection for journalists similar to that of religious personnel, delegates of ICRC, civil defense staffs, and medical personnel. In 1972, UN introduced in General Assembly Resolution 2854 (XXVI) a draft proposal to establish a special status for journalist operating in armed conflicts. However, this proposal was rejected while drafting of Additional Protocols in 1977. It was rejected on the basis that increasing the categories with a special status would tend to weaken the protective value of each protected status already accepted, particularly that of medical personnel (ICRC Commentary to Art 79 of Protocol I, para 3265). Also, some journalists preferred to keep their profile low because they felt that a special status would single them out and put them at greater risk of being targeted. (Gasser, 2003)

Providing another special status could result in confusion regarding principle of distinction and eventually enhance misunderstandings. It can also be assumed that all journalists might not be impartial in their occupation and could be biased towards certain governments or militaries. Providing this type of journalists' similar protection as that of medical personnel appears odd and not in line with the intent of IHL to protect those who are in danger. In addition, applying special protection for journalists can only be successfully implemented if journalists are clearly distinguishable from civilians in the field (Düsterhöft, 2013).

c) Mandatory Identity Cards and Distinctive Emblems

Issuing mandatory identity cards and creating distinctive emblems can improve identification of journalists operating in armed conflicts. Article 79(3) of Additional Protocol I also mentions the provision of issuing and carrying identity cards for the journalists. This could enhance identification of journalists and eventually lead to their better protection. Also, war correspondents and independent journalists, if they have identity cards, can be easily identified in case of their arrest. Additionally, indiscriminate and accidental attacks on journalists could be reduced to a very large extent.

However, by becoming clearly identifiable, journalists could also be deliberate targets as the belligerents may identify them as unwanted witnesses (Düsterhöft, 2013). Issuing identity cards and distinctive emblems will surely help in diminishing misunderstanding as to who is a journalist. Alternative protection in case of deliberate attacks can surely help in effective implementation of this proposal.

d) Creating War Crime liability for attack on Journalist

This proposal argues that attack on journalists should be specifically mentioned as a war crime under Articles 8(2)(b) and (c) of Rome Statute of International Criminal Court (ICC). Journalists are protected as civilians in IHL, and attack on civilians is already a war crime according to Article 85(3)(e) of Additional Protocol I. Thus, Rome Statute has already been protecting attack on journalists indirectly.

Scholars supporting this proposal argue that expressly mentioning in Rome Statute would reinforce, deter, and criminalize attack on journalist in armed conflicts, thereby eliminating any justifications on the basis of misunderstanding.

VII. Conclusion

Journalists occupy an important role in the society. They stand for freedom of expression and have a vital role in ensuring people's right to information. In conflict areas, they are the watchdog for action of belligerents. Still, they remain increasingly vulnerable in course of their mission in war prone areas. Although they enjoy range of protections in armed conflicts, attack on them continues.

Media personnel and journalists who are to be deployed in conflict situations should be given appropriate risk awareness and hostile environment training by their media organization. They should also be provided with protective health and safety equipment. It is the primary role of journalists themselves to better protect them. Additionally, journalists should be educated in relation to their responsibilities, forbidden actions, and protection afforded by IHL.

Journalists cannot be better protected by single-dimensional approach. Most proposals mentioned on the previous part are dependent on each other, and a coherent and universal approach is needed for success of protecting journalists. Also, focusing only on legal texts will not enhance the protection in the actual battlefield, especially with regard to increasing nature of deliberate attacks, lack of knowledge of law, and misunderstanding about media's role. Thus, instead of focusing on *de jure* protection, we need to follow more practical approach which includes educating and increasing awareness among society and militaries about the value and role of journalists.

Also, it is recommended to strengthen national laws for individual attacks on journalists. The domestic law should be able to reinforce the expressiveness of punishment for attacks on journalists, the requirement to investigate, prosecute and punish any unlawful attacks and arrests and further criminalize such unlawful behavior. International Humanitarian Law, International Criminal Law, human rights law, and domestic laws should work coherently and complement one another for effective protection of journalists.

Overall, it has to be realized that all dangers and threats on journalists cannot be completely eliminated and they continue to remain famous and effective targets in the future, not least due to the nature of their profession. The approach to enhancing journalists' protection in the future is a comprehensive responsibility that cannot be successfully executed by one entity, but must rather evolve into a common mission pursued by militaries, journalists, governments, media, NGOs and society.

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